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No. 03-507

In the Supreme Court of the United States

FAX.COM, INC., PETITIONER

v.

STATE OF MISSOURI, EX REL.
JEREMIAH W. (JAY) NIXON,
ATTORNEY GENERAL OF MISSOURI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 47 U.S.C. 227(b)(1)(C), the provision of the Telephone Consumer Protection Act of 1991 that prohibits the transmission of unsolicited commercial advertisements to a telephone facsimile machine, violates the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 323 F.3d 649. The opinion of the district court (Pet. App. 19a-42a) is reported at 196 F. Supp. 2d 920.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2003. A petition for rehearing was denied on July 3, 2003 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 1, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, § 3(a), 105 Stat. 2395, to address problems arising out of technological advances in telemarketing and fax advertising. The TCPA, which was the culmination of three years of legislative proposals and hearings,[1] imposed restrictions on a variety of advertising practices, including unsolicited fax advertising and telephone soliciting using automated dialing and prerecorded message systems. See 47 U.S.C. 227(b)(1).

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[1] The One Hundred First Congress considered four bills addressing telemarketing practices. See H.R. 628, 101st Cong., 1st Sess. (1989); H.R. 2131, 101st Cong., 1st Sess. (1989); H.R. 2184, 101st Cong., 1st Sess. (1989); H.R. 2921, 101st Cong., 1st Sess. (1989); *Telemarketing Practices: Hearing on H.R. 628, H.R. 2131 and H.R. 2184 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989) (*1989 House Hearing*). The One Hundred Second Congress, which enacted the TCPA, considered six bills. See H.R. 1304, 102d Cong., 1st Sess. (1991); H.R. 1305, 102d Cong., 1st Sess. (1991); H.R. 1589, 102d Cong., 1st Sess. (1991); S. 1410, 102d Cong., 1st Sess. (1991); S. 1442, 102d Cong., 1st Sess. (1991); S. 1462, 102d Cong., 1st Sess. (1991); *S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 1410, The Telephone Advertising Consumer Protection Act; and S. 857, Equal Billing for Long Distance Charges: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. (1991) (*1991 Senate Hearing*); *Telemarketing/Privacy Issues: Hearing on H.R. 1304 and H.R. 1305 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (1991) (*1991 House Hearing*); S. Rep. No. 177, 102d Cong., 1st Sess. (1991); S. Rep. No. 178, 102d Cong., 1st Sess. (1991); H.R. Rep. No. 317, 102d Cong., 1st Sess. (1991). The final bill that became the TCPA combined features of H.R. 1304, S. 1410, and S. 1462.

As relevant here, the TCPA prohibits the use of a "telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. 227(b)(1)(C). An "unsolicited advertisement" is defined as an advertisement of "the commercial availability or quality of any property, goods, or services" that is transmitted without the recipient's "prior express invitation or permission." 47 U.S.C. 227(a)(4).

Section 227(b)(1)(C) was intended to protect recipients against the costs and inconveniences resulting from the transmission of unwanted fax advertising. As the House Report recognized, because fax machines "are designed to accept, process, and print all messages which arrive over their dedicated lines," fax advertising imposes burdens on unwilling recipients distinct from the burdens imposed by traditional advertising. H.R. Rep. No. 317, 102d Cong., 1st Sess. 10 (1991). Unlike recipients of advertising sent by regular mail, recipients of fax advertising must pay the costs to produce the advertisement, including "both the cost associated with the use of the facsimile machine and, the cost of the expensive paper used to print out facsimile messages." *Id.* at 25. Moreover, while the fax advertisement is being printed, recipients are typically unable to use their fax machines to send or receive other messages. *Ibid.* The Senate Report thus concluded that requiring advertisers to obtain recipients' consent before sending fax advertising was "necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner's uses of his or her fax machine." S. Rep. No. 178, 102d Cong., 1st Sess. 8 (1991).

The TCPA authorizes the Attorney General of a State (or other designated state official) to sue to enjoin

a pattern or practice of transmissions to residents of the State in violation of the TCPA. 47 U.S.C. 227(f)(1). The TCPA also creates a private right of action in state court to enforce its provisions "if otherwise permitted by the laws or rules of court of a State." 47 U.S.C. 227(b)(3). In either variety of suit, the plaintiff may obtain injunctive relief and recover actual monetary loss or $500 per violation, whichever is greater; in cases involving willful or knowing violations, treble damages may be recovered. 47 U.S.C. 227(b)(3) and (f)(1).

2. After having received "numerous consumer complaints," the State of Missouri brought suit against petitioner, alleging that petitioner was engaged in a pattern or practice of sending unsolicited fax advertisements in violation of 47 U.S.C. 227(b)(1)(C). Pet. App. 4a.[2] Petitioner moved to dismiss the State's complaint, contending that Section 227(b)(1)(C) violates the First Amendment. The State's suit against petitioner was consolidated with the State's suit against a second fax advertiser. The United States intervened to defend the constitutionality of the TCPA.

The district court, after conducting an evidentiary hearing, held that Section 227(b)(1)(C) violates the First Amendment. Pet. App. 19a-42a. The court applied the "'intermediate' level of scrutiny" standard articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 563-566 (1980), which considers whether a regulation of truthful commercial speech is addressed to a substantial govern-

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[2] In addition, the Federal Communications Commission has issued a Notice of Apparent Liability for Forfeiture against petitioner for allegedly having violated Section 227(b)(1)(C) on 489 occasions. *In re Fax.com, Inc.*, 17 F.C.C.R. 15,927 (2002). That proceeding remains pending.

ment interest, directly advances that interest, and is narrowly tailored. Pet. App. 30a. After "question[ing]" whether the government has any substantial interest in restricting unsolicited faxes, the court held that Section 227(b)(1)(C) does not directly advance that interest, noting that the provision applies only to unsolicited advertisements, not to other unsolicited material sent by fax. *Id.* at 37a. The court also held that Section 227(b)(1)(C) is not sufficiently narrowly tailored, because Congress could have advanced its interests by "less intrusive" means, such as by establishing "a national 'no-fax' database." *Id.* at 39a.

3. The court of appeals reversed. Pet. App. 2a-18a. Like the district court, the court of appeals analyzed Section 227(b)(1)(C) under the *Central Hudson* standard. Unlike the district court, however, the court of appeals upheld Section 227(b)(1)(C) as a permissible regulation of commercial speech.

First, the court of appeals concluded that Section 227(b)(1)(C) serves "a substantial interest" in protecting owners of fax machines against "cost shifting and interference" caused by unsolicited fax advertising. Pet. App. 9a. The court found ample evidence in the congressional hearings that preceded the TCPA's enactment of "the potential harm of unrestrained fax advertising," including testimony that recipients did not want to have their fax machines tied up and their fax supplies used by advertisers sending unsolicited faxes. *Id.* at 7a-8a. The court also noted that the evidence introduced in the district court demonstrated that "the harms of unsolicited fax advertising are real and have not been eliminated by technological changes" since the TCPA's enactment. *Id.* at 8a.

Second, the court of appeals concluded that Section 227(b)(1)(C) "directly and materially advances the

asserted governmental interest" in preventing cost-shifting to recipients of unsolicited fax advertising and interference with those recipients' use of their fax machines. Pet. App. 14a. The court held that Congress was not constitutionally required to prohibit all unsolicited fax transmissions, whether commercial or not, in order to advance that interest, finding "no reason to doubt that Congress * * * believed * * * that noncommercial faxes did not present the same problem as commercial faxes." *Id.* at 10a. The court also held that Congress need not impose identical prohibitions on other varieties of unsolicited advertising such as live telemarketing calls. *Id.* at 14a.

Finally, the court of appeals concluded that Section 227(b)(1)(C) "achieves a reasonable fit between the means it adopts and the ends it seeks to serve." Pet. App. 17a. The court explained that "[a]dvertisers remain free to publicize their products through any legal means," including by faxes sent with the recipient's consent. *Id.* at 15a. "Given the cost shifting and interference imposed by unsolicited commercial faxes and the many alternatives left available to advertisers," the court observed, "TCPA's approach is 'in proportion to the interest served . . . [and is] narrowly tailored to achieve the desired objective.'" *Id.* at 15a-16a (quoting *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 632 (1995), and *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989)).

ARGUMENT

The court of appeals correctly held that 47 U.S.C. 227(b)(1)(C), which prohibits the transmission of advertisements to telephone fax machines without the recipient's consent, is a constitutional regulation of commercial speech. The court of appeals' decision is

consistent with the decisions of this Court considering First Amendment challenges to various commercial speech regulations, as well as with the decisions of all of the other appellate courts that have considered First Amendment challenges to Section 227(b)(1)(C) itself. This Court's review is, therefore, not warranted.

I. THE TCPA'S PROHIBITION OF UNSOLICITED FAX ADVERTISING IS A CONSTITUTIONALLY PERMISSIBLE REGULATION OF COMMERCIAL SPEECH UNDER THE STANDARD ARTICULATED BY THIS COURT

This Court has recognized that regulations of commercial speech are valid as long as they are addressed to a substantial governmental interest, directly advance that interest, and are narrowly tailored. See *Board of Trustees* v. *Fox*, 492 U.S. 469, 475-480 (1989); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563-666 (1980). As the Court has explained, that standard does not require a legislature to employ "the least restrictive means" of regulation or to achieve a perfect fit between means and ends. *Fox*, 492 U.S. at 480. It is sufficient that the legislature achieve a "reasonable" fit by adopting regulations "in proportion to the interest served." *Ibid.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)). Section 227(b)(1)(C) easily satisfies that standard.

A. The Government Has A Substantial Interest In Protecting Individuals And Businesses From Having Their Fax Machines And Supplies Used Without Their Consent By Fax Advertisers

1. As the court of appeals recognized, the government has "a substantial interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such unwanted advertising

places on the recipient." Pet. App. 9a; accord, *e.g.*, *Destination Ventures, Ltd.* v. *FCC*, 46 F.3d 54, 56 (9th Cir. 1995) (acknowledging "the government's substantial interest in preventing the shifting of advertising costs to consumers" through unsolicited fax advertising).

In reaching that conclusion, the court of appeals examined the extensive record before Congress documenting the increasingly pervasive "'junk fax' problem." Pet. App. 7a. Witnesses informed Congress that unwanted fax advertisements consumed recipients' fax paper and prevented recipients from using their fax machines to send or receive other faxes. See *id.* at 7a-8a. Congress was told that the problem was a potentially massive one, because, for example, "at least one fax advertiser could 'routinely send[] 60,000 fax advertisements per week.'" *Id.* at 7a. Congress was also advised that, although a number of States had enacted or were considering enacting legislation to restrict unsolicited fax advertising, national legislation was needed to provide "a full solution to a problem likely 'to grow' in scale." *Ibid.* (quoting *1989 House Hearing* 83).[3]

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[3] See, *e.g.*, *1991 House Hearing* 31 (statement of Thomas Beard, Chairman, Florida Public Service Commission, on behalf of National Association of Regulatory Utility Commissioners) (observing that "[t]he junk fax advertiser is a nuisance who wants to print [its] ad[] on your paper" and whose "call also seizes your fax machine so that it is not available for calls you want or need"); *id.* at 47 (statement of Janlori Goldman, American Civil Liberties Union) (stating that the proposed restrictions on unsolicited fax advertisements could be justified "because of the burden that is placed on the individual who has to pay for the cost of the communication"); *1991 Senate Hearing* 41 (statement of Michael Jacobson, Center for the Study of Commercialism) (stating that unsolicited fax advertisements "not only use the recipient's paper,

The court of appeals also observed that the evidence introduced in the district court confirmed that "the costs and amount of interference resulting from unrestrained fax advertising continue to be significant." Pet. App. 8a. Such evidence established, among other things, that unsolicited fax advertising can cost the recipient more than $100 a year in paper and other supplies, that most fax machines still cannot send or receive more than one transmission at a time, and that unsolicited fax advertising "interferes with company switchboard operations and burdens the computer networks of those recipients who route incoming faxes into their electronic mail systems." *Ibid.*

Based upon the evidence before Congress and the district court, as well as "simple common sense," *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995) (quoting *Burson* v. *Freeman*, 504 U.S. 191, 211 (1992)), the court of appeals correctly concluded there is "a substantial governmental interest in protecting the public from the cost shifting and interference caused by unwanted fax advertisements." Pet. App. 17a-18a. It is that substantial government interest that justifies Section 227(b)(1)(C).

2. Petitioner does not, and cannot, identify any decision of this Court that suggests, much less holds, that an advertiser has a First Amendment right to appropriate individuals' and businesses' equipment, paper, and ink, without their consent, for the dissemination of its own advertising. And, consequently, petitioner does not, and cannot, identify any decision of this Court that casts doubt on the substantiality of the government's interest in protecting against such appropriation.

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but also prevent faxes from being sent out and prevent legitimate faxes from coming in").

More generally, the Court has recognized the government's important interest in protecting captive audiences against expressive activity of an unduly intrusive nature. See, *e.g.*, *Hill* v. *Colorado*, 530 U.S. 703, 715-718 (2000); *Florida Bar*, 515 U.S. at 624-625; *Frisby* v. *Schultz*, 487 U.S. 474, 484-485 (1988); *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748-749 (1978); *Rowan* v. *Post Office Dep't*, 397 U.S. 728, 735-738 (1970). If, as the Court has recognized, the government may restrict even political protest in order to protect against interference with the peaceful enjoyment of one's own home, see, *e.g.*, *Frisby*, 487 U.S. at 487-489, the government surely may restrict unsolicited fax advertising in order to protect against interference with the use of one's own fax machine and its supplies. As the Court observed in *Rowan*, "[t]o hold less would tend to license a form of trespass" or conversion, because any "asserted right of a mailer * * * stops at the outer boundary of every person's domain," 397 U.S. at 737, 738.

Contrary to petitioner's suggestion, the governmental interest underlying Section 227(b)(1)(C) is not the "suppress[ion]" of "unpopular[] * * * speech" (Pet. 11), in the sense of restricting the *content* of speech, as distinguished from its *mode* of dissemination. Congress's concern was with preventing advertisers from engaging in conduct that tied up recipients' fax machines and expended their paper and other supplies. See Pet. App. 7a-9a; cf. *1989 House Hearing* 2 (statement of Rep. Edward J. Markey, Chairman of the Subcommittee) (observing that "receiving a junk fax is like getting junk mail with the postage due"). Congress left advertisers free to convey their messages by other modes—including television and radio, newspapers, billboards, leaflets, bulk mail, and (subject to certain constraints) telephone—as well as by fax with the

recipient's consent. Petitioner's reliance on *United States* v. *Eichman*, 496 U.S. 310, 318 (1990), and *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 71-72 (1983), is consequently misplaced, because those cases involved restrictions designed to restrict the speaker's message.

B. Section 227(b)(1)(C) Directly Advances The Government's Interest In Preventing Cost-Shifting And Interference With Owners' Use Of Their Fax Machines

The court of appeals also correctly concluded that the prohibition on unsolicited fax advertising in Section 227(b)(1)(C) "directly and materially advances" the government's interest in protecting fax machine owners from the costs and other burdens of unsolicited faxes. Pet. App. 14a. Contrary to petitioner's assertions (see Pet. 8-12), that conclusion is not undermined by Congress's choice to prohibit only unsolicited advertising, and not other unsolicited messages sent by fax.

As the court of appeals explained, because the record before Congress demonstrated that advertisers were "responsible for a large portion of the problem" arising from unsolicited fax transmissions, Congress could advance its interests by focusing on fax advertising exclusively. Pet. App. 13a-14a; see *Kaufman* v. *ACS Sys., Inc.*, 2 Cal. Rptr. 3d 296, 319 (Ct. App. 2003) ("When Congress addressed the issue of unsolicited faxes, the evidence indicated that the source of the problem was *advertisements that offered 'all kinds of products and services.'*") (quoting 137 Cong. Rec. 18,123 (1991) (statement of Sen. Fritz Hollings)); cf. 5/23/03 Report and Recommendation at 8, *Texas* v. *Fax.com, Inc.*, No. A-02-CA-080 JN (W.D. Tex. approved June 18, 2003) (noting that at least 500 million unsolicited fax ad-

vertisements are sent annually). This Court has recognized that "the Government [is not required to] make progress on every front before it can make progress on any front." *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 434 (1993).

The Court's decision in *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993), does not, as petitioner suggests, require Congress to restrict *all* unsolicited fax transmissions in order to address a problem confined principally to unsolicited fax advertising. See Pet. 9. In *Discovery Network*, the Court invalidated a city ordinance, purportedly intended to address aesthetic and safety concerns, that prohibited newsracks that dispensed commercial handbills but permitted all other newsracks. The Court explained that the ordinance could have "only a minimal impact" on aesthetics and safety because it resulted in the removal of just 62 newsracks, while leaving 1500 to 2000 newsracks in place. 507 U.S. at 414, 418. For that reason, the Court concluded that the ordinance's distinction between commercial and noncommercial newsracks bore "no relationship *whatsoever*" to the city's asserted interests, and therefore could not be justified. *Id.* at 424. That concededly "narrow" holding, *ibid.*, does not have any application here.

Unsolicited fax advertisements constitute the bulk of all unsolicited faxes, just as commercial telephone solicitations "constitute the bulk of all telemarketing calls." Pet. App. 13a (citing H.R. Rep. No. 317, *supra*, at 16). Congress thus had a reasonable basis for concluding that the problem resulting from unsolicited fax transmissions would be directly and materially ameliorated by restricting fax advertising. *Discovery Network* does not bar the government from focusing on the principal source of the problem, and thereby according greater

latitude to noncommercial speech than to commercial speech. See Pet. App. 10a n.4; cf. *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Village of Stratton*, 536 U.S. 150, 165 (2002) (suggesting that ban on door-to-door solicitation, which was intended to protect residents' privacy and prevent fraud, would be permissible if limited to commercial solicitations); *City of Ladue* v. *Gilleo*, 512 U.S. 43, 58 n.17 (1994) (observing that "[d]ifferent considerations might well apply" to a ban on off-site commercial advertisements on residential property as distinguished from the ban on political signs at issue in that case).

Nor do the Court's decisions in cases such as *Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173 (1999), and *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), provide any assistance to petitioner. See Pet. 8. In those cases, the government sought to justify restrictions on the advertising of casino gambling (in *Greater New Orleans*) and the labeling of beverages with high alcohol content (in *Coors*) based on its interest in suppressing demand for the products being advertised. The Court reasoned that, because the applicable "regulatory regime" in each case was "pierced by exemptions and inconsistencies," there was "little chance" that the speech restriction at issue could "directly and materially advance[] its aim." *Greater New Orleans*, 527 U.S. at 190, 193 (quoting *Coors*, 514 U.S. at 489). That is not the case here. Because Section 227(b)(1)(C) reaches the vast majority of unsolicited fax solicitations, there is every reason to believe that Section 227(b)(1)(C) will materially advance the govern-

ment's aim of deterring cost-shifting and interference with the owner's use of his fax machine.[4]

C. Section 227(b)(1)(C) Is Narrowly Tailored To Advance The Government's Interest

The court of appeals finally held that Section 227(b)(1)(C)'s prohibition of unsolicited fax advertisements "achieves a reasonable fit between the means it adopts and the ends it seeks to serve." Pet. App. 17a. That conclusion, too, is correct.

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[4] As the court of appeals recognized, Congress also had evidence before it that unsolicited fax advertisements were more burdensome and intrusive than unsolicited faxes of other types, which were less likely to be unwanted. Pet. App. 10a (citing H.R. Rep. No. 317, *supra*, at 16). Petitioner contends that "privacy-based interests" should be disregarded in this context, because faxes are received "primarily by businesses." Pet. 10-11. Many fax machines, however, are owned by individuals in their homes or small businesses. See *Minnesota* v. *Sunbelt Communications & Mktg.*, 282 F. Supp. 2d 976, 978-979 (D. Minn. 2002) (describing affidavits of one individual who "received so many advertisements on her home fax machine that they used all of the toner and caused her to miss faxes that she expected and wanted to receive," a second individual who "received approximately five advertisement bundles from [a single source] each week" on the fax machine in his home office, and a third individual who "received fax advertisements between 4:15 a.m. and 7:15 a.m." at the fax machine in her home); *In re Fax.com, Inc.*, 17 F.C.C.R. at 15,931-15,932 (allegation that "several consumers" were "awakened very late at night or in the early hours of the morning" by petitioner's transmission of unsolicited fax advertising). Moreover, as the evidence in the record of this case demonstrates, unsolicited fax advertising causes unique disruptions for businesses, such as interference with their switchboard and electronic mail systems. See Pet. App. 8a; see also *Sunbelt*, 282 F. Supp. 2d 978; *In re Fax.com, Inc.*, 17 F.C.C.R. at 15,932-15,933 (allegation that petitioner's transmission of fax advertising tied up a physician's fax line reserved for receiving patient medical data).

The scope of Section 227(b)(1)(C) conforms closely to the problem at which it was directed. That provision does not ban fax advertisements. It simply requires advertisers to obtain the recipient's consent before using his fax machine, paper, and other supplies to print their advertisements. Advertisers can use various simple and inexpensive means, such as bulk mailings, to determine which businesses or individuals wish to receive their fax transmissions.

Petitioner is incorrect in asserting that Section 227(b)(1)(C) is not sufficiently narrowly tailored, because Congress might have advanced its interest by placing the burden on fax machine owners affirmatively to indicate that they do not want to receive fax advertising. See Pet. 12-16. As this Court has recognized, "[t]he Government is not required to employ the least restrictive means conceivable" in regulating commercial speech, for the First Amendment requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Greater New Orleans*, 527 U.S. at 188 (quoting *Fox*, 492 U.S. at 480).

Congress's choice to impose the burden of avoiding unwanted fax advertising on advertisers was especially reasonable, given the record before Congress that virtually *no* recipients want their fax machines used to receive and print unsolicited advertising. For example, Congress was informed that "business owners are virtually unanimous in their view that they do not want their fax lines tied up by advertisers trying to send messages," and that "[e]xtensive research has revealed no case of a company (other than those advertising via fax) which opposes legislation restricting advertising via fax." *1989 House Hearing* 54-55 & n.35 (statement

of Professor Robert L. Ellis, Indiana University Law School). Members of Congress were thus entitled to conclude that Section 227(b)(1)(C)'s requirement that advertisers obtain the consent of the recipient before transmitting a fax advertisement was "the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner's uses of his or her fax machine." S. Rep. No. 178, *supra*, at 8.

Nothing in *Thompson* v. *Western State Medical Center*, 535 U.S. 357 (2002), suggests that Section 227(b)(1)(C) is not sufficiently narrowly tailored to satisfy the First Amendment. *Thompson* involved a prohibition on the advertising of compounded drugs that had not been approved by the Food and Drug Administration (FDA), which the government defended as an accommodation of its interests in preserving both the integrity of the FDA's approval process for drugs marketed broadly and the availability of compounded drugs for individual patients. See 535 U.S. at 368. The Court concluded that the advertising prohibition did not satisfy the *Central Hudson* standard, explaining that "[s]everal non-speech-related means of drawing a line between compounding and large-scale manufacturing might be possible," and that "[t]he Government has not offered any reason why these possibilities, alone or in combination, would be insufficient." *Id.* at 372, 373. Here, however, there is no "non-speech-related means" of advancing the government's interest in preventing the cost-shifting and interference with fax machine use caused by unsolicited fax advertising. The most effective means of doing so is by barring transmissions of unsolicited fax advertising. Whether the bar applies automatically, as under Section 227(b)(1)(C), or only in response to a recipient's registered objection to such transmissions, is not a difference of consti-

tutional dimensions. See *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 217-218 (1997) (a law does not fail intermediate scrutiny merely "because some alternative solution is marginally less intrusive on a speaker's First Amendment interests").

II. THE TCPA'S PROHIBITION OF UNSOLICITED FAX ADVERTISING HAS BEEN UNIFORMLY UPHELD BY FEDERAL AND STATE APPELLATE COURTS AGAINST FIRST AMENDMENT CHALLENGES

Although petitioner urges the Court to grant review in this case to resolve asserted "confusion among the lower courts" in the analysis of commercial speech regulations (Pet. 6), there is no confusion about the constitutionality of the TCPA's fax advertising regulation. In the more than a decade since the TCPA was enacted, no appellate court, state or federal, has held that Section 227(b)(1)(C) violates the First Amendment.

The Ninth Circuit, like the Eighth Circuit here, has upheld Section 227(b)(1)(C) under the First Amendment as a permissible regulation of commercial speech. See *Destination Ventures*, 46 F.3d at 56-57. A number of federal district courts have also rejected First Amendment challenges to Section 227(b)(1)(C). See *Minnesota* v. *Sunbelt Communications & Mktg.*, 282 F. Supp. 2d 976, 981-984 (D. Minn. 2002); *Texas* v. *American Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1091-1092 (W.D. Tex. 2000); *Kenro, Inc.* v. *Fax Daily, Inc.*, 962 F. Supp. 1162, 1167-1169 (S.D. Ind. 1997); 5/23/03 Report and Recommendation, *Texas* v. *Fax.com, Inc.*, No. A-02-CA-080 JN (W.D. Tex. approved June 18, 2003).

Because TCPA cases in which a private party is the plaintiff are generally heard in state court, see 47

U.S.C. 227(b)(3), several state courts have had occasion to consider the constitutionality of Section 227(b)(1)(C). The two state appellate courts that have addressed the question have sustained Section 227(b)(1)(C) under the First Amendment. See *Harjoe* v. *Herz Fin.*, 108 S.W.3d 653 (Mo. 2003); *Kaufman*, 2 Cal. Rptr. 3d at 312-324. State trial courts generally have done so as well. See, *e.g.*, *Covington & Burling* v. *International Mktg. & Research, Inc.*, Civ. No. A. 01-0004360, 2003 WL 21384825 (D.C. Super. Ct. Apr. 17, 2003), amended on reconsideration, 2003 WL 21388272 (D.C. Super. Ct. May 14, 2003); *Whiting Corp.* v. *MSI Mktg., Inc.*, No. 02 CH 6332 (Ill. Cir. Ct. Apr. 3, 2003), slip op. 2-8; *Mark Chair Co.* v. *Mortgage Managers, Inc.*, No. 02 LK 247 (Ill. Cir. Ct. Dec. 20, 2002); *Levitt* v. *Fax.com, Inc.*, No. 24-C-01-2218 (Md. Cir. Ct. Nov. 27, 2002), slip op. 7-10; *Robin Hill Dev. Co.* v. *JD&T Enters.*, No. 01 L 527 (Ill. Cir. Ct. Oct. 3, 2002). Only two New York trial court decisions, following the reversed district court decisions in this case, have held that Section 227(b)(1)(C) violates the First Amendment, and those cases are on appeal. See *Rudgayzer & Gratt* v. *Enine, Inc.*, 749 N.Y.S.2d 855 (Civ. Ct. 2002); *Bonime* v. *Perry Johnson, Inc.*, No. 61977 KCV (Civ. Ct. Nov. 8, 2002).

Accordingly, whatever need there might be for this Court's guidance about the constitutionality of other statutes, no such need exists with respect to the TCPA's restriction on fax advertising. Indeed, even outside the context of Section 227(b)(1)(C), petitioner does not identify any decisional conflict that would warrant certiorari. Although petitioner claims a conflict between the court of appeals' decision in this case and decisions striking down "laws that target commercial speech for reasons unrelated to its commercial content," petitioner relies solely on three district court

decisions that were not appealed or were overturned on appeal and a fourth in which an appeal is pending. Pet. 20; see Pet. 22; see also *FTC* v. *Mainstream Mktg. Servs., Inc.*, 345 F.3d 850 (10th Cir. 2003) (granting stay pending appeal in First Amendment challenge to federal telemarketing regulations on ground, *inter alia*, that the government is likely to prevail on the merits). Petitioner's other claimed "conflicts" reflect, at most, mild tension between lower courts' slightly differing analytic approaches. Moreover, those decisions arise under wholly different regulatory schemes (often schemes directed at the content of a message rather than the mode of its dissemination), and thus do not suggest that any court would have viewed Section 227(b)(1)(C) any differently from the Eighth Circuit here.

Acknowledging the absence of any square circuit conflict on the validity of Section 227(b)(1)(C), petitioner urges that the Court nonetheless should grant review, because the economic pressures on defendants to settle cases such as this one could prevent a conflict from arising. See Pet. 26-30. If fax advertisers face significant liability, however, one would expect them to mount vigorous defenses, including challenges to the constitutionality of Section 227(b)(1)(C). Such challenges may be able to be mounted without the risk of incurring significant damages. If advertisers elect to settle claims against them, it is presumably because they share the overwhelming view of the courts that Section 227(b)(1)(C) passes constitutional muster. To the extent that large damages awards raise other constitutional concerns, those concerns are not implicated here, where the district court invalidated Section 227(b)(1)(C) on its face.

III. THIS IS NOT A SUITABLE VEHICLE TO CONSIDER ANY MODIFICATION OF THIS COURT'S ANALYSIS OF COMMERCIAL SPEECH REGULATIONS

Finally, although petitioner urges the Court to grant review in order to consider whether the *Central Hudson* standard should continue to apply to commercial speech regulations (Pet. 22-26), this would not be a suitable vehicle in which to consider that question. In the first place, the court of appeals did not analyze whether the *Central Hudson* standard should be modified or supplanted, observing simply that "the Supreme Court has recently indicated that *Central Hudson* remains the test for the constitutionality of a restriction on commercial speech." Pet. App. 6a. Nor did petitioner preserve the question in the courts below.

As petitioner notes, several members of the Court have suggested that a standard stricter than *Central Hudson*'s should apply to certain varieties of commercial speech regulations. See *Thompson*, 535 U.S. at 367-368. Those suggestions have generally been offered, however, in connection with regulations designed to suppress speech because of its content for reasons described as paternalistic. For example, Justice Thomas has maintained that "the *Central Hudson* test should not be applied" in cases "in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace." *Greater New Orleans*, 527 U.S. at 197 (Thomas, J., concurring in judgment)) (quoting *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in judgment). Similarly, Justice Stevens, joined by Justices Kennedy and Ginsburg, has urged that strict scrutiny should apply to "complete

bans on truthful, nonmisleading commercial speech" that "rest solely on the offensive assumption that the public will respond 'irrationally' to the truth." 44 *Liquormart*, 517 U.S. at 502, 503 (opinion of Stevens, J.) (quoting *Linmark Assocs., Inc.* v. *Willingboro*, 431 U.S. 85, 96 (1977)).

Section 227(b)(1)(C) is not the sort of regulation to which *any* Member of the Court has urged the application of strict scrutiny. That provision is not a "complete ban" on the advertising of any product or service, much less one designed to keep consumers "ignorant" of information that the government thinks would harm them. It allows advertisers to disseminate any commercial message without regard to its content. It merely prohibits advertisers from appropriating a recipient's fax machine, paper, and other supplies, without his consent, in order to disseminate the message. Regulations of that sort pose no impediment to the freedom of speech protected by the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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